

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 359/2010**

% **Date of Decision: 20.01.2010**

UNION OF INDIA & ORS. Petitioners

Through: Mr.Anshuman Sinha, Advocate

Versus

JAI KANWAR KAUSHIK Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

: MOOL CHAND GARG, J.

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1. Petitioner has approached this Court aggrieved of the order dated 12.08.2009 in OA No. 2123/2004 directing the petitioners to disburse pay and allowances to the respondents for the period on which he was not on duty. The plea of the petitioner that the respondent was avoiding to join his duties on the post of Electric Fitter (Power) though the said post does not bring him in contact with Diesel oil, grease, mobil oil, chromic water and petrol etc. was declined by the Tribunal.

2. To appreciate the contentions raised by the petitioners, it would be appropriate to take note of some of the facts:

- i) After medical de-categorization the respondent was recommended to be given duties at such a place where he does not come in contact with Diesel oil, grease, mobil oil, chromic water and petrol etc. as per the certificate dated 28.05.1999. However, no such posting was given to the respondent.
- ii) His suitability was adjudged by a committee of three officers on 23.08.2001 and he was found fit to be given the job of Electric Fitter (power) but the said post was not accepted by the respondent on the ground that it involved heavy work and, therefore, he requested for a post of Ticket Collector on medical grounds.
- iii) On 06.01.2003, Chief Medical Superintendent requested to the Sr. DME/DSL to advise him, if the job of Tech.(Elect.) Gr.III involves contact with Diesel oil, grease, mobil oil, chromic water and petrol.
- iv) The Dy. Chief Mech. Engineer/DSL vide letter bearing no. 25.3./DSL/SSB/208/03 informed the Chief Medical Superintendent that on the said post the employee will come in contact with Diesel Oil, Grease, Mobile Oil, Chromic Water and Petrol. Consequently, the respondent was directed to present himself before the Chief Medical Superintendent for reexamination. But the respondent neither visited the Chief Medical Superintendent nor did he come back to the office, instead he approached the Central Administrative

Tribunal by filing an O.A. which was registered as O.A. No. 2123/2004.

- v) The said O.A. was disposed of vide order dated 15.05.2007 whereby directions were given to the petitioners to constitute a Medical Board of 5 specialized/senior doctors of relevant fields to adjudge and consider the respondent's suitability to various posts to which he can be considered and thereafter, regulate his posting/appointment. However, the Tribunal declined to pay arrears of pay and allowances to him for the period the respondent was not on duty.
- vi) Aggrieved from the aforesaid order, the respondent filed a writ petition before this Court which was registered as W.P.(C) No.3768/2008 when the case was remanded back to the Tribunal with a direction to pass a speaking order on the aspect of arrears of pay and allowances.
- vii) On 12.08.2009, the Tribunal allowed the O.A. No.2123/2004 whereby the impugned order has been passed allowing him pay & allowances of the intervening period during the time these were stopped by the Respondents till such time as he was adjusted in an alternative job after the directions of this Tribunal.

3. Assailing the impugned order, the petitioners have submitted that the Tribunal has not only contradicted his own order dated 15.5.2007 but has also ignored the fact that it was the respondent who was avoiding to join his duties on the post of

Electric Fitter (Power) which does not bring the respondent in contact with Diesel oil, grease, mobil oil, chromic water and petrol etc.

4. The Tribunal while passing final order in O.A. No.2123/2004 had come to the conclusion that despite medical advice not to put the respondent on a post where he may come in contact with Diesel oil, grease, mobil oil, chromic water and petrol, the petitioners have not given alternative appointment to the petitioner till such time he was appointed as Halwai and in this manner it is the petitioners who kept the respondent away from the job and for which he cannot be faulted.

5. The Tribunal while passing the order dated 15.05.2007 in O.A. No.2123/2004 gave the following directions to the petitioners.

5. In the circumstance, we are left with no alternative but to dispose of present OA directing the respondents No.2 to constitute a Board of five specialists/Senior Doctors of relevant fields to adjudge and consider suitability of the applicant for various posts to which he could be considered and thereafter regulate his posting/appointment. We may make it clear that we are not inclined to grant arrears of pay and allowance as claimed, particularly when he had not discharged functions of any post. The aforesaid exercise shall be completed within a period of three months from the date of receipt of the order, including the orders passed after conducting medical examination, No costs.

6. Dissatisfied with the aforesaid order, respondent filed a writ petition bearing No. WP(C)No. 3768/2008, when this Court observed as under:-

Learned counsel for the petitioner refers to the Provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, as per which on his de-categorization the petitioner was entitled to be considered for another job which he could perform notwithstanding his disability and during the interregnum it was the duty of the employer also to continue to pay the salary to the petitioner.

Learned counsel for the respondent, on the other hand, submits that the alternate job was offered to the petitioner even earlier but he did not join and demanded the job of Ticket Collector (TCR). Thus, it is argued that since it is the petitioner who is at fault in not joining the job, in that case he is not entitled to salary for the intervening period. The respondents, in this behalf, have referred to instructions contained in circular being PS No.12144 issued by Railway Board.

From the orders of the Tribunal, it is apparent that the Tribunal has not discussed the aforesaid contentions of the parties. Only on the ground that the petitioner did not perform any duties, he has been denied wages for the intervening period. This approach of the Tribunal may not be entirely correct having regard to the provisions contained in Section 47 of the Disabilities Act. At the same time, it was also necessary for the Tribunal to deal with the contentions of the respondents as to whether it was the fault of the petitioner in not taking of the job which was allegedly offered to him. As the past salary is denied without giving any reasons and dealing with the above contentions, we set-aside the order of the Tribunal and remit the case back to the Tribunal to pass a speaking order after hearing the parties on this aspect. The parties shall appear before the Tribunal on 06th April, 2009.

7. In fact, the circular of the petitioner bearing number R.B.E. No. 213/2000 provides for absorption of medically de-catergorised staff in alternative employment. It also provides that the respondent should have been kept on a special supernumerary post till suitable post is

found for him. Under these circumstances, the Tribunal after taking note of the provisions contained under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the judgment of the Apex Court in *Kunal Singh Vs. Union of India and Another*, 2003 (4) SCC 524 passed the order dated 12.08.2009 with following directions:-

7. The Respondents placed the Applicant in the post of Technician (Power) after he was medically decategorised on the ground that he should not come in contact with diesel oil, mobil oil, chromic water etc. without taking into account that he would suffer from the same problem in the new post also. Therefore, it cannot be said that the Respondents have adjusted the Applicant on a suitable post after he acquired the aforesaid disability of inability to work in an ambience where diesel oil etc. were present. In spite of the certificate of the Deputy Chief Engineer (Mechanical), forwarded to the Respondents that in the post offered to the Applicant he would suffer from the same disability, the Respondents did not still offer him a suitable post and also did not keep him on a supernumerary post. The Respondents are to be entirely blamed for the fact that the Applicant remained without work during the period when he was medically decategorised and subsequently offered the post of 'Halwai' on the directions of this Tribunal, as has been noted in the first paragraph of the judgment of the Honourable High Court.

8. In the light of the above discussion, the Applicant would be eligible for payment of his pay and allowances during the time these were stopped by the Respondents till such time as he was adjusted in an alternative job after the directions of this Tribunal. The above amount would be paid to the Applicant of this Tribunal. The above amount would be paid to the Applicant within three months from the date of receipt of a certified copy of this order. No costs.

8. The learned counsel for the petitioner submitted that the order of Tribunal has been passed in complete ignorance of the facts that the respondent was provided with the alternative job of Electric Fitter (power), which has nothing to do with the oil, grease, chromic water etc., but the same has been refused by the respondent.

9. This is not the correct factual position. The Tribunal after considering various departmental communication including medical records has opined that the post which was offered to the respondent was also not such a post where he was fit to perform his duties in view of the provisions contained in medical certificate bearing no. 54-Med/Mb/J&K/99 issued by Chief Staff Surgeon. It was only on 30.05.2008, they gave the respondent the post of Halwai, since when he is working regularly on that post. Accordingly, Tribunal has allowed the OA filed by the respondent.

10. We find no infirmity in the order passed by the Tribunal warranting interference under Article 226 of the Constitution of India. Accordingly, the writ petition is dismissed.

MOOL CHAND GARG, J.

JANUARY 20, 2010
dc/anb

ANIL KUMAR, J.